

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition for Reconsideration of Various)	AU Docket No. 09-205
Auction 87 Public Notices)	
)	
Petition to Deny Long-Form License)	File No.0043558856
Application of Silke Communications, Inc.)	
(Auction 87))	
)	File No. 0004359102
Petition to Deny Long-Form License)	
Application of Two Way Communications)	
(Auction 87))	

**APPLICATION FOR REVIEW OF BUREAU’S
APRIL 27, 2012 MEMORANDUM OPINION AND ORDER**

Pursuant to Section 1.115 of the Federal Communications Commission’s (“FCC” or “Commission”) rules, Warren Havens and six entities under his control (collectively, “Petitioners”)¹ hereby file this Application for Review of the Memorandum Opinion and Order adopted April 27, 2012, FCC 12-676. Petitioners filed today a petition for reconsideration based on new facts of this Order. That petition should be passed upon first, prior to action on this Application for Review and that decision on the petition may moot the need for, or change the nature of, this appeal to the Commission.

I. INTRODUCTION

In its April 27, 2012 Memorandum Opinion and Order (“Order”) the Mobility Division and Auctions and Spectrum Access Division, Wireless Telecommunications Bureau (“Bureau”) erroneously dismissed Petitioners’ petition for reconsideration of the Auction 87 public notices

¹ V2G LCC, Intelligent Transportation & Monitoring Wireless LLC, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC, Verde Systems LLC and Environmental LLC.

and the petitions to deny the license applications. As set forth below, Petitioners have been aggrieved by the Bureau's delegated authority and therefore are entitled to a review of the Order and its underlying grounds by the Commission. With this Application, Petitioners ask that the Commission find:

- Petitioners have standing to pursue their arguments in the Petitions to Deny;
- The arguments raised in the petition for reconsideration of the Auction 87 public notices should be considered with the Petitions to Deny;
- The petitions to deny the Two Way and Silke applications (collectively referred to as "Petitions to Deny") met the pleading requirements of section 1.939 of the Commission's rules;
- The Commission's policy that allows applicants to amend their short-form applications to request a lower bidding credit constitutes an *ultra vires* rule change; and
- The Bureau's "admonishment" is contrary to Petitioners' First Amendment and Due Process rights and directly conflicts with statute, regulation, case precedent and established Commission policy.

The Commission's review of the Bureau's Order is timely and warranted given the fact that the Order is in conflict with the United States Constitution, federal statute, regulation, case precedent, and established Commission policy. Along with this Application for Review the Petitioners are filing a Petition for Reconsideration of the Denial of the Petitions to Deny based on new facts raised by the Bureau's Order. The Petitioners ask that while the Bureau reviews and reconsiders its Order the Commission stay consideration of this Application for Review and hold further proceedings on this Application for Review in abeyance.

II. SUMMARY OF ARGUMENT

The Bureau's Order is a textbook example of decision-making gone awry. In a procrustean manner, the Bureau manipulated the FCC's "policies" and pleading standards to reach a predetermined result. That is, to deny outright Petitioners' filings. In addition, the decision is riddled with inconsistencies. For example, the Bureau concludes that Petitioners failed to meet the Commission's pleading standards and that it could not sufficiently discern the facts and arguments underlying the Petitions because they were set forth in prior pleadings that were incorporated by reference. However, it was an FCC staff member that explicitly permitted Petitioners to simply incorporate by reference prior pleadings (containing more than sufficient facts and arguments). *See, e.g.*, Supplement and Amendment to Petition for Reconsideration, page 10 (referencing and incorporating Exhibit 5; Appendix 3, email from Mr. Connelly to Mr. Havens confirming that Petitioners could reference and incorporate prior filings).² Regardless of this concocted justification for its denial, the Bureau was not confused by Petitioners' arguments seeing that it identified the "gravamen" of Petitioners' arguments as gleaned from the Ninth Circuit papers.

With its Order, the Bureau conveniently chose snippets of arguments presented by Petitioners and glossed over the substance and crux of the Petitions. That crux of Petitioners' filing has been obvious from the start. Petitioners challenge that the FCC has materially modified 47 C.F.R. §1.2105(b) (and undermined the purposes and mandates of a related statute, 47 U.S.C. §309(j)). This regulation governs, *inter alia*, requirements of and permissible

² In addition, in response to Mr. Havens' request to exceed the 25 page limit the Bureau expressly acknowledged the fact that the Petitioners would be submitting, as part of the amended petition for reconsideration, certain pleadings filed in the Ninth Circuit, believing such pleadings to be an efficient way to present the case. The Bureau then stated that it found "good cause" why Petitioners will exceed the 25 pages and granted the request. *See* Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Warren C. Havens, October 15, 2010.

amendments to FCC “short form” applications to participate in FCC license auctions. As described in Petitioners’ pleadings, the FCC’s *ultra vires* rule change permits parties to: (i) falsely certify their eligibility for FCC “Designated Entity” bidding credits;³ (ii) obtain bidding credits based upon these false certifications; (iii) outbid competitors at auction; and (iv) thereafter, once they have outbid entities properly entitled to bidding credits, amend their short form applications.

To justify the validity of the FCC’s “policy” on minor and major amendments, the Bureau improperly relies on irrelevant dicta, factually distinct proceedings that are on appeal, and glosses over the relevant history underlying the enactment of § 1.2105.1 The Bureau’s disregard for this insightful record is nothing short of baffling. However, the most outrageous aspect of the Order is found in the Bureau’s final words threatening Petitioners. The Bureau’s

³ Section 1.2105(a)(2)(iv) refers to Section 1.2110 if an applicant is applying as a “designated entity” or small business. *See* Section § 1.2110 Designated entities (emphasis added).

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Eligibility for small business and entrepreneur provisions --(1) Size attribution. (i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of

its controlling interests, and the entities with which it has an attributable material relationship shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, the affiliates of its controlling interests, and the entities with which it has an attributable material relationship.

....

For a designated entity to get a bidding credit, the applicant’s “size” includes its affiliates, controlling interests, etc.

“admonishment” flies in the face of Petitioners’ First Amendment and Due Process Rights and will not be tolerated.

In short, the Bureau’s analysis of its denials defies even casual review, because the Order is riddled with contradictions and avoidance of the facts and law. There is, however, one plainly discernible theme - a decisional process dead set on establishing an *ultra vires* rule change. The Bureau self-selected arguments while ignoring the record to facilitate a predetermined outcome. This was not reasoned decision-making because the Bureau did not apply the facts and law evenhandedly and in a well-articulated manner. Therefore, as set forth more fully below, the Bureau’s failure to conform to elementary standards of reasoned decision-making warrants a reversal of the Order.

III. ARGUMENT

A. Petitioners Have Standing

For the multitude of reasons set forth in the Petitions and incorporated pleadings, Petitioners have standing to file their Petitions to Deny. Despite this, the Bureau concludes that Petitioners lack standing to bring the Petitions to Deny. In the context of FCC auctions, United States Courts of Appeal have consistently rejected similar FCC contentions of speculative injury/lack of standing, particularly where the FCC attempts to change auction rules without statutory authority. *See, e.g., U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000) (“A bidder in a government auction has a right to a legally valid procurement process; a party allegedly deprived of this right asserts a cognizable injury.... A disappointed bidder need not... demonstrate that it would be successful if the contract were let anew but only that it was able and ready to bid... and that the [rule] prevent[ed] it from doing so on an equal basis”); *High Plains Wireless, LP v. FCC*, 276 F.2d 599, 605 (D.C. Cir. 2002) (“High Plains complains that it was

injured because the Commission awarded the license to Mercury, which had violated the anti-collusion rule, instead of holding a new auction in which High Plains could bid free of the illicit influence of reflexive bidding.... High Plains' contentions that Mercury tried to mislead the Commission and to influence the Commission through illicit ex parte contacts also assert a cognizable injury, that of deprivation to a valid, impartial administrative proceeding, which injury this court could redress by reversing the Commission..."). Clearly, the skewed auction structure and regulatory environment, created through the Commission's *ultra vires* rule change, established the requisite legal interest and standing.

In addition, the Order affects Petitioners' pending Application for Review as to Auction 61 and associated petition for reconsideration on new facts. The Order reflects new FCC authority on the subject rules, including 1.2105, and this, by itself, gives Petitioners legal standing to file this Application for Review of the Order, due to its effect upon Petitioners' Auction 61 related petitions now pending.

Notwithstanding this, even assuming for argument's sake that Petitioners lack standing, the Bureau's failure to fully address the merits of the Petitions to Deny was wrong. The Commission has previously addressed petitions to deny even though it has found a petitioner lacks standing. *See In the Matter of Petition for Reconsideration and Motion for Stay of Paging Systems, Inc.*, Memorandum Opinion and Order, FCC 10-54 at para. 22 (Adopted April 12, 2010) (Commission chose to address the merits of petition to deny Petitioners' auction applications *despite the fact* that Paging Systems was found to lack standing). Equal protection under the laws mandates consideration of the Petitions to Deny.⁴ At a minimum, the

⁴ The Equal Protection Clause of the Fourteenth Amendment protects citizens from discrimination. U.S. Const. Amend. XIV, § 1. Specifically, the Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally

Commission should consider the Petitions to Deny an Informal Objection pursuant to Section 73.3587 of the Commission's rules.

B. The Arguments Raised in the Petition for Reconsideration of the Auction 87 Public Notices Should be Considered with the Petitions to Deny

While the Bureau concedes that Petitioners timely filed for reconsideration of the Auction 87 public notices, it finds that the public notices did not grant, establish, or deny any rights and as a result, were interlocutory and, pursuant to section 1.106, may not be the subject of a petition for reconsideration. Instead, under these circumstances, the Bureau finds the proper vehicle through which to challenge an interlocutory order would be to raise any pertinent argument in a petition to deny a long form application, not a petition for reconsideration of the *Accepted for Filing Public Notice*. The Bureau continues by finding that because it is dismissing the Petitions to Deny, the Petition for reconsideration of the *Accepted for Filing Public Notice* provides no occasion to address the substantive issues raised in the Petition for Reconsideration. However, as set forth more fully below, the Bureau's denial of the Petitions to Deny is in error. Therefore its rejection of the arguments raised in the Petition for Reconsideration challenging the application of the FCC's "policy" concerning minor amendments is also erroneous. As a result, the Commission should find the arguments raised in the Petitions for Reconsideration to be proper and considered in conjunction with the Petitions to Deny.

treats one differently than others similarly situated without any rational basis for the difference. *See Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 312 (6th Cir.2005); *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 681–82 (6th Cir.2011). In this case, to allow other parties to proceed despite lack of standing but to deny this opportunity to Petitioners would treat similarly situated parties differently without a rational basis in violation of the Equal Protection Clause. Moreover, under the First Amendment, the right to petition is a protected fundamental right. U.S. Const. Amend. I. This fundamental right applies to petitions to government agencies such as the Commission. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1962); U.S. Const. Amend. I.

C. The Petitions to Deny Satisfy the Requisite Pleading Requirements

The Bureau incorrectly concluded that the Petitions to Deny do not set forth any specific allegations of fact or make any arguments *per se* because they simply incorporate by reference the text and exhibits from other proceedings. Order at para 18-19. The text incorporated by reference clearly meets the pleading standards in the Commission's rules. The rules provide that... "A petition to deny must contain specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity."⁵ The purpose of this rule is to ensure that the Commission reviews only "concrete factual assertions which if proved in a subsequent hearing would alter the Commission's public interest calculus."⁶ Because the public interest is not concerned with issues that are too remote or speculative, the rules seek to exclude unsupported petitions relying exclusively on conclusory assertions.⁷ In its initial review under section 1.939(d), "[t]he Commission's inquiry at this level is much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."⁸

The Petitions to Deny clearly meet the letter and purpose of section 1.939. Although not contained in the body of the pleading, a host of specific facts supporting the Petitions to Deny follow in the numerous exhibits. Contrary to those pleadings which the rules aim to exclude, the Petitions do not rely exclusively upon conclusory or speculative assertions but reference specific

⁵ 47 C.F.R. § 1.939(d).

⁶ *Gencom Inc. v. F.C.C.*, 832 F.2d 171, 180-81 (D.C. Cir. 1987).

⁷ See, e.g., *United States v. FCC*, 652 F.2d 72 (D.C.Cir.1980) (en banc) (legal and economic conclusions without specific factual support do not meet the pleading requirement).

⁸ *Gencom Inc.*, 832 F.2d at 181.

factual allegations that support the Petitions. Including the facts and arguments in exhibits is entirely appropriate as more fully discussed following.

Moreover, general principles guiding federal pleading standards highlight the Bureau's erroneous rejection of the Petitions. Under the federal rules, only "a short and plain statement of the claim showing that the pleader is entitled to relief" is required.⁹ The rules require a plaintiff only to give a defendant fair notice of the plaintiff's claim and the grounds on which it rests.¹⁰ Similar to the general notice pleading standard, section 1.939 of the FCC's rules aims to provide the Commission simple notice of a claim that meets the requirements of the rule (i.e. that granting the application would not be in the public interest). The copious filings referenced in the Petitions to Deny provide far more than mere notice of a claim that the application would contravene the public interest. They identify numerous facts that if proven true would require the FCC to deny the application to uphold its role as defender of the public interest.

Finally, the Bureau shamefully hides behind the lame claim that it cannot figure out Petitioners' arguments and therefore the Petitions fail to meet the pleading standard. The Commission can clearly comprehend from the detailed arguments in the exhibits how granting the applications would harm the public interest. In fact, the Bureau dedicates five pages to the merits of Petitioners' arguments, clearly demonstrating that the Bureau identified and comprehended the facts and claims alleged. In such a situation, where a party has actual notice of a claim, failure to specifically allege the claim is generally considered harmless error and should not serve as a bar to the claim.¹¹

⁹ Fed.R.Civ.P. 8(a).

¹⁰ Fed.R.Civ.P. 8(a); *See Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007).

¹¹ *See, e.g., Nielson v. Armstrong Rubber Co.*, 570 F.2d 272, 275 (8th Cir. 1978) ("Amendments are allowed when the parties have had actual notice of an unpleaded issue and have been given

Ultimately, even if the Commission finds the Petitions to Deny defective for failure to meet the requirements of section 1.939, in the interest of following the spirit of the rules, the FCC should treat the Petitions as informal objections under section 73.3587. Under section 73.3587, “[b]efore FCC action on any application for an instrument of authorization, any person may file informal objections to the grant.”¹² Unlike section 1.939, this rule does not have specific pleading requirements. Instead, informal objections are governed by the more general pleading standards under section 1.41.¹³ To further the public interest, the FCC should construe an actionable pleading as valid under any applicable rule. Here, the Commission should construe the pleadings as informal objections if it must reject the Petitions in their present form.

D. It is Well Established that Incorporation by Reference Permitted and Proper

Reference and incorporation is efficient and soundly within common FCC and court practice and precedent (including reference and incorporation practice used by the Commission and Bureau itself). *See, e.g., In re: Entercom Portland License, LLC*, DA 08-495 (Rel. March 4, 2008); *In the Matter of Communications TeleSystems International Application*, Memorandum Opinion and Order, DA 96-2183, 11 FCC Rcd. 17471, 1996 FCC LEXIS 7206 (Rel. Dec. 31, 1996); *Artis v. Bernake*, 630 F.3d 1031, 2011 U.S. App. LEXIS 519, 111 Fair Empl. Prac. Cas. (BNA) 300; 94 Empl. Prac. Dec. (CCH) P44,078, Decided January 11, 2011.

Reference and incorporation is clearly permitted and in the public interest, and commonly used by the FCC itself. *See, e.g.,* DA 08-495, DA 96-2183, 630 F.3d 1031, 986 F.2d 541. Under section 1.49(a), the standard is simple: it is permitted if the referenced material is clearly identified, relevant, and readily available. The Petition’s referenced and incorporated materials

an adequate opportunity to cure any surprise resulting from the change in the pleadings.”) (citing 6 C. Wright & A. Miller, *Federal Practice and Procedure* s 1491 at 455 (1971)).

¹² 47 C.F.R. § 73.3587.

¹³ 47 C.F.R. § 1.41.

meet those criteria. The exhibits are clearly marked, highly relevant and easily accessible to the Commission.

Moreover, section 1.49(a) addresses paper filings; section 1.49(e) deals with electronic ULS filings, including the Petitions which were electronically filed through ULS. Section 1.49(e) has no specifications stated, since Section 22.6 does not exist. Thus, no FCC rule currently governs incorporation by reference for electronically filed materials. However, by well-established practice, reflected in the authorities cited above, reference and incorporation as used in the Petition is clearly permissible.

E. The Bureau Understood the “Gravamen” of Petitioners’ Arguments But Neglected to Fully Address the Substantive Merits of the Arguments

The Bureau continues by rejecting what it “discern[s] to be the gravamen of the Havens Parties’ principal complaint.” Order at para. 29. That is the Commission’s “policy” of allowing an auction applicant to reduce its bidding credit request prior to the auction.¹⁴ As explained in the pleadings incorporated by reference, the Commission’s “policy” is an unlawful *ultra vires* rule change.

1. The Bureau’s Interpretation of §1.2105 is Unfounded

The Bureau cannot and does not deny that the FCC must abide by its own rules and regulations. *Reuters Limited v. FCC*, 781 F.2d 946, 947 (D.C. Cir. 1986). Nor can it legitimately contest that in order to revise a regulation, the FCC must comply with the notice and comment procedures mandated by the Administrative Procedure Act. *See Barahona-Gomez v. Reno*, 167 F.3d 1228, 1235 (9th Cir. 1999). Notwithstanding these governing principles of law, the Bureau again sanctions an *ultra vires* rule change under the guise that it is an acceptable FCC “policy.”

¹⁴ The Bureau seemingly attempts to argue that the Bureau’s Mobility Division’s findings in Auction 61 have some type of preclusive effect here. Such an attempt must fail.

As was explained in earlier papers, section 1.2105(b)(2) prohibits major application amendments and permits minor amendments, which, under the regulation, are in the nature of “typographical errors.” As explained by the Bureau, the crux of the FCC’s “policy” is that prohibited major amendments include *only* amendments that are associated with an actual change to an applicant’s size. Order at p.13. Thus, in the FCC’s view, all other proposed amendments, regardless of their nature, would have to be considered “non-major.” Such an interpretation is absurd and by adopting this “policy,” the FCC has implemented an unwarranted *ultra vires* rule change (in Public Auction 87 and other auctions) that conflicts with §1.2105.

2. The Bureau’s Interpretation Distorts the Plain Language

The Bureau’s concocted position does violence to the plain language of §1.2105 itself and its rulemaking history and to the articulated public policies underlying the auction process. “Major amendments” are defined in §1.2105 to “*include changes...in an applicant's size which would affect eligibility for designated entity provisions*” (emphasis added). An applicant’s “change in size” must be viewed within the context of a claim for designated entity status. Otherwise, the statute could have simply been written to bar all “changes in size,” as opposed to “changes...in an applicant's size *which would affect eligibility for designated entity provisions*”). Moreover, the use of the word “include” in the regulation plainly connotes that the list of major amendments described in the regulation is intended to be non-exclusive. Thus, the prohibition on “major amendments” first and foremost bars misrepresentations as to bidding credit eligibility status.

The Bureau seems to believe that the regulation is concerned primarily with the applicant’s size and not with its request for a bidding credit. In fact, the opposite is true. Within the wireless auction context, an applicant’s size has meaning *only* in connection with the

designated entity bidding credit. Indeed, the concept of an applicant's "size" is not addressed anywhere in the FCC's regulations except within the context of the designated entity bidding credit.¹⁵ The FCC has itself admitted that "*the size criterion applies only to the small business bidding credit*, which is based upon the bidder's revenues." *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 161 (D.C. Cir. 2003) (emphasis added).

3. Common Sense Dictates Treating Reduction in Bidding Credit as a Major Amendment

Simply applying common sense to the issues raised in the Petitions highlights the absurdity in the Bureau's position. Section 1.2105(b)(2) explicitly states that:

"Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major."

Typographical errors are the only example provided in the rule. Clearly, the primary (and only) example of what classifies as a "minor" amendment is "typographical errors". The Commission has also advised that "Permissible minor changes include the deletion and addition of authorized bidders (to a maximum of three) and revision of addresses and telephone numbers of applicants and contact persons."¹⁶ The Bureau tries to tie a change in bidding credit level to something akin to a typographical error. That is absurd. First, the Commission itself has treated changes to bidding credits as major changes.¹⁷ Moreover, a bidding credit is a major component of FCC auctions. Companies applying for designated entities status to get a bidding credit have

¹⁵ See 47 C.F.R. 1.2110(b)(1), discussing "size attribution" in determining designated entity status.

¹⁶ Supplemental Am New Station & Major Modification Auction Filing Window for Auction 84; Minor Modification Application Freeze, 22 F.C.C.R. 16217, 16232 (2007).

¹⁷ "Applicants will not be permitted to make major modifications to their applications (e.g., change their license selections, change the certifying official, change control of the applicant, **or change bidding credits**)."¹⁷ *Multiple Address Sys. Spectrum Auction Scheduled for April 26, 2005*, 19 F.C.C.R. 24445, 24462 (2004) (emphasis added).

to provide extensive disclosures of their affiliates and their and their affiliates' gross revenues. The bidding credit allows qualified smaller bidders to more effectively compete with larger applicants who do not qualify for a bidding credit - it provides a 25% to 35% discount on gross bids. Such a discount can be quite substantial and to classify it as something similar to a typographical error is erroneous. Bidding credits are a major tool and component of FCC auctions, something that can directly affect the outcome of an auction, including who are winning bidders. A typographical error it is not and characterizing it as such is arbitrary and capricious.¹⁸

4. The Bureau's Interpretation Leads to Absurd Results

Finally, the Bureau's interpretation of §1.2105 leads to absurd results. There can be no dispute that an entity that accurately certifies its entitlement to a designated entity bidding credit at the inception of the application process cannot amend its short-form application at later stages to either subsequently jettison, or subsequently claim, the bidding credit if its "size" (*i.e.*, its attributable gross revenue) increases or decreases during the course of the process. *A fortiori*, a party that *misrepresents* its bidding credit eligibility status at the inception of the application process (either by overstating or understating attributable gross revenue) should not be permitted to subsequently cure this misrepresentation. Yet, according to the Bureau, a party can compete with unlawful bidding credits, in excess of what it deserves, achieved by submitting false certifications, so long as the entity's actual "size" hasn't changed. There is no basis in the language of the regulation or in logic for such an untenable interpretation; *i.e.*, that a truthful certification cannot be amended, but a false one can. In fact, the regulation bars both.

¹⁸ Moreover, the Bureau ignores the fact that § 1.2105(b)(2) could have been drafted to limit major amendments to those "effectuated by a change in applicant size." The fact that the regulation isn't drafted this way should not be lost. The regulation as enacted indicates that any amendment which is not in the nature of a "typographical" change is a barred major amendment.

5. *The Bureau's Reliance upon the Biltmore Decision is Misplaced*

In support of its denials the Bureau cites to *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 162 (D.C. Cir. 2003). The Bureau's reliance on *Biltmore* is misplaced for several reasons. First, *Biltmore* involved a different certification than the one at issue in this case.¹⁹ And, while the *Biltmore* court rejected the contention that the winning bidder's disclosure of a loan from a third party was an incurable major amendment, the bidding credit at issue in *Biltmore* was the "new entrant bidding credit," not the small business bidding credit at issue in this case.²⁰ This is a crucial distinction. The circumstances with the Petitions, by contrast, clearly implicate §1.2105(b)(2)'s prohibition on "major amendments" affecting eligibility for the small business bidding credit. Finally, although there is *dicta* in *Biltmore* (at page 163) suggesting that amendments which decrease an applicant's eligibility for a bidding credit are not "problems" under the rationale of §1.2105(b)(2), Petitioners have shown why this *dicta* should not be followed. The Bureau however, ignores these arguments. See Order at p. 13.

6. *The Biltmore court and the Bureau Ignore the Rulemaking History*

By accepting the *Biltmore* dicta, the Bureau ignores the rulemaking history of §1.2105(b)(2). As discussed in its earlier papers, in the course of enacting §1.2105(b)(2), the FCC considered a proposal that would have permitted applicants after the short-form deadline to disclaim or "down-grade" a claim for a bidding credit discount via an amendment (in the manner attempted by Silke and Two-Way, and endorsed by the FCC in DA 10-863):

[C]ommenters' opinions differ on what types of amendments the Commission should categorize as major or minor. For example, AT&T and ISTA argue that

¹⁹ The certification in that case (regarding the media interests of an applicant's immediate family members) was not a *required* certification under §1.2105(b) (or any regulation). *Biltmore* at 176 ("Because the family certification was not required by §1.2105, the omission could be cured"). Here, by contrast, the certification at issue **was** required by §1.2105(a)(iv).

²⁰ *Id.*, at 161-63.

major amendments should include all changes in ownership that constitute a change in control, as well as all changes in size that would affect an applicant's eligibility for designated entity provisions. In contrast, Metrocall contends that all changes in ownership incidental to mergers and acquisitions, non-substantial pro forma changes, and involuntary changes in ownership should be categorized as minor. Metrocall also states that an applicant should not be permitted to upgrade its designated entity status after the short form filing deadline (i.e., go from a "small" to "very small" business), but should be permitted to lose its designated entity status as a result of a minor change in control (i.e., exceed the threshold for eligibility as a small business).

63 FR2315, 2322 (January 15, 1998), (emphasis added).

The FCC rejected this proposal:

[W]e believe that a definition of major and minor amendments similar to that provided in our PCS rules is appropriate. After the short-form filing deadline, applicants will be permitted to make minor amendments to their short-form applications both prior to and during the auction. However, applicants will not be permitted to make major amendments or modifications to their applications after the short-form filing deadline....Consistent with the weight of the comments addressing the issue major amendments will also include any change in an applicant's size which would affect an applicant's eligibility for designated entity provisions....In contrast, minor amendments will include, but will not be limited to, the correction of typographical errors and other minor defects, and any amendment not identified as major.

Id.

Indeed, in its older administrative decisions, the FCC itself recognized the importance of adhering to the letter of Section 1.2105(b)(2). In *In re: Two Way Radio of Carolina, Inc.*, 14 FCC Rcd. 12035 (1999), Two Way sought a waiver of section 1.2105(b)(2) to permit it to increase its eligibility for a bidding credit. The FCC denied the waiver request, holding that a "modification of an applicant's small business status does not constitute a minor change under our competitive bidding rules . . ." *Id.* at 12039 (emphasis added). The FCC determined that "a change that would result in granting the applicant **a different status or** affording the applicant greater financial benefits than it has requested in its application" was barred. *Id.* at 12041.

(emphasis added).²¹ The FCC properly concluded that a contrary ruling would "undermine the integrity of the auction itself." *Id.*

In addition, there exist sound public policy reasons articulated by Congress for establishing and protecting bidding credit eligibility, including fostering competition, promoting new and small wireless businesses and protecting the integrity of the bidding process.²² By contrast under the rule change scheme practiced by the FCC, applicants are economically incentivized (or at minimum allowed) to misrepresent their bidding credit eligibility (thereby permitting them to outbid other bidders at auction).

Finally, the Bureau seems particularly annoyed that Petitioners continue to challenge the *ultra vires* rule change given the fact Petitioners have raised similar concerns in other proceedings. *See* Order at p. 13. The Bureau's attempt to rely on its own decisions is self-serving, particularly since certain of these decisions are being challenged by Petitioners.

F. The Bureau Failed to Address the Fact that Two Way and Silke Did Not Meet the Standards for a Waiver

As set forth in the Petitions to Deny (*see also* Exhibit 8 attached thereto), Silke's and Two Way's respective request for waiver did not meet standard for a waiver grant. As shown at Exhibit 8 to the Petitions to Deny, both Silke and Two Way sought to amend their short forms after the Form 175 filing deadline. What is important to note is that neither Silke nor Two Way met the standard for waiver under Section 1.925. The error of granting a deficient waiver

²¹ By virtue of the Determination's Rule-Change component, the FCC allows bidders to bid with credits greater than those certified and deserved, as long as the bidder pays for those credits after the auction (i.e., the "adjustment"). As such, that Rule Change is more damaging to lawful competitors and auction integrity than the waiver sought by Two Way in the 1999 matter, because it fosters false certifications by bidders. As discussed, § 1.2105(b)(2) clearly disqualifies an applicant whose certification as to a level of bidding credit was false at the application deadline, whether the actual credit deserved was higher or lower.

²² *See* 47 U.S.C. §309(j).

request was addressed in the Petitions to Deny. However, again the Bureau ignored this fact and neglected to explain why or how the Bureau's grant of the requests met the standard for waiver under Section 1.925.

As explained in the Petitions to Deny, neither Silke nor Two Way relied on the *ultra vires* rule change when it filed its amendment. Rather it plead a rule-waiver request, Silke pleading *pro se* ignorance and that if its effective waiver request was not granted, then it would encourage others in the future to hide cheating. Silke's argument in support of the waiver was incredulous to say the least. Two Way merely revealed that it no longer sought a bidding credit because of "increased Disclosable Interest Holders gross revenue."

Neither applicant properly requested a waiver. Notwithstanding this, the FCC seemingly granted the waiver requests despite the fact that they were not requested in accordance with the Commission's rules or procedures. As explained in the Petitions to Deny, defective waiver requests further warrant a denial of the applications. These arguments however were not addressed by the Bureau in its Order. By granting the "waiver request" in the manner that it did and then failing to provide any justification for the same sets a bad precedent and one the Bureau should avoid. In any event, its disregard of this argument amounts to further error warranting the Commission's review and reversal of the Bureau's Order.

G. Under the Bureau's Order The Petition to Deny Two Way's Application Should be Granted

Petitioners argued in their Petitions to Deny that the changes Silke and Two Way made to their Forms 175 were major amendments. The change that Two Way made to its Form 175 appears to have been a change in the applicant size contrary to the FCC's decision. Two Way's amended Form 175 lists only two Disclosable Interest Holders of Two Way: Diane Boihem and Lester L. Boihem (*See Attachment 1 hereto and Petitioners' notes and highlights on it that are fully referenced and incorporated herein*).

Diane Boihem is listed as holding 51% of Two Way and Lester Boihem is listed as holding 49% of Two Way. In an attachment to its amended Form 175, Two Way stated that it no longer sought a bidding credit because “This has occurred due to the increased Disclosable Interest Holders gross revenue.” See Exhibit 8 to Petition to Deny. For purposes of attributable gross revenues of the two Disclosable Interest Holders in Two Way, only the gross revenues of the controlling interest holder, Diane Boihem, are relevant to Two Way and its auction application. Thus, it appears what Two Way meant by its amended Form 175 filing was that Diane Boihem had an increase in attributable gross revenues that caused loss in the Two Way claimed bidding credit. Diane Boihem, as the controlling interest holder and majority owner in Two Way is part of the applicant Two Way. Therefore, even assuming the Bureau's interpretation of Section 1.2105(b)(2) is correct, the FCC appears to have allowed a change in applicant size by grant of the Two Way 175 and 601. This shows the Bureau is straining so much to make an interpretation of Section 1.2105(b)(2) that allows the *ultra vires* rule change that it overlooked the Two Way amended Form 175 underlying facts and may have allowed Two Way to do exactly what the Order says is not permitted.

In any case, from Two Way's amended Form 175 and the statements on its attachment, there was no way for the FCC to know whether or not Two Way meant a change in the applicant's gross revenues, the controlling interest holders' gross revenues, or of an affiliate's gross revenues. Therefore, at minimum, the FCC should have granted the Petition to Deny and moved to hold a hearing and investigation under Section 309 to determine what changes in Disclosable Interest Holder gross revenue were in fact made that lead to a loss in bidding credit. It erred for not doing that and should now do so upon reconsideration.

H. Application of the Bureau’s Order Would Result in Unequal Treatment of Bidders in an Auction

A result from the Order’s finding that allows bidders to go down in bidding credit also creates unequal treatment of bidders in an auction. In effect by the FCC's application of the ultra

vires rule change, it is allowing businesses that do not qualify for a bidding credit, but that apply for one and understate their gross revenues (for whatever reason), to merely go down in bidding credit with no adverse effect afterwards (thus providing businesses with an undeserved bidding credit, among other things, a period of time to use those bidding credits, save money and raise additional funds versus other bidders), while on the other hand genuine small or very small businesses that qualify for a bidding credit, but overstate their gross revenues, are disqualified from the auction if they later discover they should have had more of a bidding credit, or are prohibited from obtaining the bidding credit amount that they should have had. That is unfair and unequal treatment and flies in the face of the entire purpose of the bidding credit program, which is to benefit small and very small business, not unqualified businesses by allowing them more flexibility under the bidding credit program and auction rules. This proposition is supported by the exhibits and arguments raised in the Petition for Reconsideration and Petitions to Deny. Specifically, included in the papers referenced and incorporated are facts and arguments from an expert economist that show the Bureau's interpretation of Section 1.2105 is anticompetitive and damaging.

The Order and its effect of disparate treatment on bidders highlights the absurdity that would result if the Bureau's interpretation is accepted. In short, entities that have affiliates that are not under their control but are cooperative in that they provide application data that can be certified have an advantage over similar entities that wish to bid and participate in the auction process but have uncooperative affiliates.²³

²³ There are numerous ways and reasons why an affiliate not under an entity's control may be "uncooperative." By way of example, the affiliate may be unavailable or unwilling to provide the data for use in an application. Or perhaps the affiliate simply doesn't have the information available. Whatever the case the entity that does not control the entity cannot offer the requisite certification when its affiliates do not cooperate. This presents the opportunity for bidders to be

I. The Bureau's Veiled Threats are an Egregious Violation of Law and the Petitioners' Rights

In the most appalling fashion the Bureau concludes its Order by threatening Mr. Havens. *See* Order at p. 15-16 (the “Admonishment”). As set forth below, the Bureau’s Admonishment is wrong on so many levels. Fundamentally, the bullying Bureau neglects to consider two key facts: (1) the Petitions were filed before the Commission’s imposition of the “Havens Sanction” and (2) the Commission explicitly limited its pre-filing injunction to filings made related to or in connection with Application File Nos. File Nos. 852997-853009 and 853010-853014.²⁴ Notwithstanding these facts, the Bureau argues that “The Commission’s actions in that proceeding [FCC 12-26] are relevant here to the extent that Havens, and the other Havens Parties, may be using the instant proceeding in Auction 87 to pursue issues that they have raised, and continue to pursue, in other unrelated proceedings involving different parties.” Relevant how? According to the Bureau, Petitioners’ legitimate exercise of their First Amendment and due process rights “could be characterized as a misuse of process and takes away from limited Commission resources.” As a result, the Bureau “take[s] this opportunity **to warn Havens and the entities he controls** that such action may rise to the level described in the *Havens Sanctions* proceeding imposing sanctions against Havens.” *Id.* (emphasis added). Again, what “action” is the Bureau referring to? The filing of a Petition to Deny? A Petition for Reconsideration? An Application for Review? It is well-settled that the right to petition government, protected by the First Amendment to the United States Constitution, applies to petitions to government agencies such as the Commission. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S.

treated disparately. Such a result exposes a fundamental flaw in the process. This cannot be what Congress intended or even how the Commission wants its Rules to work.

²⁴ With its Admonishment the Bureau raises new facts that form the basis for a Petition for Reconsideration being filed contemporaneously with this Application.

508, 510 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1962); U.S. Const. 1st Amendment. The Bureau's recent attempt to silence Havens through threats will not be tolerated.

The filings made have all been in accordance with the Commission's rules and fully within Petitioners' rights. As an official agency of the United States government, the FCC is bound to adhere to fundamental principles of due process.²⁵ The Fifth Amendment's Due Process Clause embodies the basic guarantee of fair treatment and rational decision-making. The *Havens Sanction* cited by the Bureau had no basis in the record and amounts to completely arbitrary agency action. That action alone was bad enough – but now, the Bureau uses the ill-conceived “Havens Sanction” to stifle Mr. Havens' rights by threatening him in a completely unrelated proceeding and based on pleadings that were filed *before the issuance of the Havens Sanction*. The Bureau's gall is mind blowing. The Bureau's “admonishment” simply cannot be squared with the Due Process Clause or the First Amendment.

In the instant proceeding there is no rule prohibiting the filings made by Havens. Quite the opposite. Petitioners had a right to file the pleadings they did. If for some reason the Bureau believed any filing was merely repetitive or without merit, it could have summarily dismissed it - thus preserving the valuable resources the Bureau alludes were wasted by Petitioners' filings. Indeed such an action would simultaneously afford Petitioners their rights and lawful opportunity to supplement the record with new facts and arguments, pursue a final agency action, and

²⁵ The Supreme Court has held that: “Due process, unlike some legal rules, is not a technical concept unrelated to time, place and circumstances. Due process is flexible and calls for such procedure protections as the situation demands.” *Matthews v. Eldridge*, 424 U.S. 319 (1976).

preserve a complete record for eventual appeal.²⁶ The Bureau did not do that. Instead it tries to squelch Petitioners' rights through a completely arbitrary, capricious, and chilling "warning" (aka, threat).

Moreover, such a warning runs against the public interest. Congress has clearly established a party's right to file petitions for reconsideration and petitions to deny. While the Bureau may not like to have its policies challenged, threatening a party from exercising his rights runs afoul of the Constitution and undercuts the public interest purpose underlying the public's right to petition.

The Bureau's attempt to muzzle Havens via an admonishment unjustifiably depriving Havens of his due process rights, stifles his freedom of speech and tarnishes his ability to prosecute claims before the FCC. It is the Bureau that should be admonished. As stated, Petitioners will not tolerate its threats and intends to fully expose the abusive nature of the Bureau's tactics.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission overturn the April 27, 2012 Memorandum Opinion and Order of the Mobility Division and Auctions and Spectrum Access Division, Wireless Telecommunications Bureau.

Dated: May 29, 2012

Respectfully submitted,

/s/

Warren C. Havens

²⁶ Or just ignored: it is well known that the FCC hardly ever rules within the 90 days set in 47 U.S.C. 405, but rules whenever it chooses with no explanation given as to timing beyond the 90 days.

2509 Stuart Street
Berkeley, CA 94705
Tel: 510-848-7797
warren.havens@sbcglobal.net